

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

RYAN P. BRABSON,)	
)	
Employee/Grievant,)	
)	DOCKET No. 12-10-569
v.)	
)	
DEPARTMENT OF SERVICES FOR)	
CHILDREN, YOUTH AND THEIR)	
FAMILIES/DIVISION OF YOUTH)	DECISION AND ORDER
REHABILITATIVE SERVICES,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on June 6, 2013 at the Public Service Commission Conference Room, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Victoria D. Cairns, and John F. Schmutz, Members,
a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Ryan P. Brabson
Employee/Grievant, *pro se*

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of Services
for Children, Youth and their Families

BRIEF SUMMARY OF THE EVIDENCE

The Department of Services for Children, Youth and their Families (DSCYF) offered and the Board admitted into evidence eight documents marked for identification as Exhibits A-G and N.

DSCYF called one witness: Elizabeth B. DiStefano, Chief of Community Relations, Division of Youth Rehabilitative Services.

The employee/grievant, Ryan P. Brabson (Brabson), offered and the Board admitted into evidence five documents marked for identification as Exhibits 1, 3-4, and 7-8.

Brabson testified on his own behalf but did not call any other witnesses.

FINDINGS OF FACT

Brabson is a Family Service Supervisor for the Division of Youth Rehabilitative Services (YRS).

On May 10, 2012, the Office of Management and Budget (OMB) posted an opening for the position of Family Services Program Support Supervisor, pay grade 18, in anticipation of the retirement of the incumbent, William J. Holstein, Jr.

Brabson applied for the promotion. OMB reviewed all of the applications and sent a referral list of nine qualified candidates to YRS. The list included Brabson and four other men and four women.

YRS conducted two rounds of oral interviews. The members of the first interview panel were: Elizabeth DiStefano (WF); Shirley Roberts (BF); and Dr. Harvey Doppelt (WM). The panel interviewed all nine candidates on May 7 - 8, 2012 using a form list of eight questions. Each member of the panel filled out a form for each candidate writing notes next to each question and checking a rating of "little or no evidence," "some evidence," and "strong evidence" for each

answer.

Four candidates (including Brabson) proceeded to a second round of interviews on May 14, 2012.¹ The members of the second interview panel were: DiStefano (WF); Richard Shaw (WM); and Carlyse Giddins (BF). The second panel used an interview form similar to the first interview panel but with different questions and the second panel did not rate the answers.

According to DiStefano, the second interview panel all agreed that Lauren Suarez was the most qualified of the four candidates. According to DiStefano, Suarez had the broadest range of experience for the position and the strongest leadership qualities. Suarez had fourteen years in service with DSCYF (compared to ten for Brabson). During that time, she held the positions of Family Service Specialist Supervisor (1998-2001), Juvenile Detention Alternative Initiative Coordinator (2003-2004), Family Service Specialist Supervisor (2004-2007), and Family Services Program Support Administrator (2007-2012).

Brabson claims that YRS discriminated against him based on his gender by selecting a woman for the position when he was better qualified. Brabson did not present any direct evidence of intentional discrimination, but claimed the Board could infer discrimination based on the circumstantial evidence offered by Brabson.

Brabson attended a training session on March 10, 2009. According to Brabson, the YRS trainer (Lynn Arnold) made the comment: "I'm sorry, but the last thing we need at DSCYF is more white males." Brabson was the only white male at the training session and Arnold's comment made him feel uncomfortable which is why he did not speak up at the time. Afterwards, Brabson complained to the YRS Director who notified Gail Wombley, Arnold's supervisor, who spoke to Arnold.

¹ According to DiStefano, the agency usually only selects two or three candidates for a second round of interviews but she added Brabson to the list to give him more interview experience.

Brabson attended a mandatory leadership training session on March 10, 2010 conducted by Dr. Myrna L. Bair of the University of Delaware Institute for Public Administration under a contract with YRS. According to Brabson, during the training session Dr. Bair made the comment: “The last thing we need is any more white males on their white horses.” Brabson complained to the YRS Director who forwarded the complaint “to Bob Challenger, as he now handles discrimination complaints for the Department.” YRS did not present the Board with any evidence about the outcome of Challenger’s investigation or any remedial action taken.

According to Brabson, YRS only invited female employees to attend a Women in Leadership workshop sponsored by Dr. Bair as part of her Women’s Leadership Development Program. But Brabson did not know whether Lauren Suarez attended any of those workshops. Nor could he show how attending one of those workshops would give any of the female candidates for promotion a leg up. Brabson availed himself of numerous in-house YRS management training courses designed to help him and others move up to higher supervisory positions. ²

Brabson also claimed that the Board can infer discrimination based on what he felt were anomalies in the promotional process. He questioned why the second interview panel did not rate the candidates’ answers to the questions like the first panel, and why the panels did not consider the candidates’ references, in particular a letter from the recently retired Family Service Program Support Supervisor who recommended Brabson for the job.

DiStefano explained that an interview panel has a choice whether to rate the candidates’ answers to questions or not. According to DiStefano, the second panel chose not to rate the

² See Exhibit F (Managing Risk Through Other People; Transfer of Learning: Supervisor’s Role in Developing Staff; Supervising Managing Group Performance; Promoting a Positive Workplace; Handling Disciplines and Grievances; and Managing Disciplines and Grievances).

questions because, at that stage in the process, the panel was not just eliciting factual information but assessing intangibles like the candidate's personal philosophy and leadership qualities. The Board Chair noted that it is standard HR practice to check only the successful candidate's references so the other candidates' employers would not know they had applied for the job.

In any event, the Board cannot infer intentional gender discrimination against Brabson because both interview panels followed the same process for each candidate, male and female. ³

CONCLUSIONS OF LAW

Merit Rule 18.5 provides:

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

Brabson does not dispute that the successful candidate for the position of Family Services Program Support Administrator (Lauren Suarez) met the job requirements. Brabson believes that he was the most qualified candidate because he has a master's degree in Counseling Behavioral Science, clinical experience, and received the highest rating (Distinguished) on his last two performance reviews. The issue under Merit Rule 18.5, however, is not whether the person promoted was the best qualified candidate. The issue is whether the person promoted was qualified. Suarez met all of the job requirements for the position of Family Services

³ Any alleged flaws in the process cannot amount to a "gross abuse of discretion" under Merit Rule 18.5. "[T]he gross abuse of discretion must occur in the actual choice of one candidate over another. . . . [I]t does not apply to an aspect of the promotion process as opposed to the actual promotion." *Department of Correction v. Justice*, C.A. No. 06A-12-006-RBY, at p. 7 (Del. Super., Aug. 23, 2007) (original emphasis).

Program Support Supervisor.

Brabson's grievance is that DSCYF discriminated against him on the basis of his gender in violation of Merit Rule 2.1.⁴

To establish a prima facie case of reverse gender discrimination, Brabson must present "sufficient evidence to allow [the Board] to conclude that [YRS] is treating some people less favorably than others based on [gender]." *Haley v. City of Plainfield*, 169 Fed.Appx. 670, 2006 WL 25708, at p.2 (3rd Cir., Feb. 6, 2006). "[T]he burden then shifts to [YRS] to articulate some legitimate, non-discriminatory reason for its adverse action." *Id.* "If the employer offers some evidence of a legitimate, non-discriminatory reason," then Brabson must show "that the stated reason was in fact pretext by pointing to 'some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" *Haley*, 2006 WL 267208, at p.2 (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994)).

The Board will assume that Brabson established a prima facie claim of reverse gender discrimination. The Board concludes as a matter of law that YRS articulated a legitimate, non-discriminatory reason for promoting Suarez and not Brabson.

In *Haley v. City of Plainfield*, the Director of Public Safety, who had ultimate responsibility for promoting police officers, testified that "based on his personal work experience

⁴ Brabson did not allege that YRS grossly abused its discretion in promoting Suarez over him. There is no evidence in the record of any bad faith by DSCYF in selecting Suarez. *See Department of Correction v. Justice*, C.A. No. 06A-12-006-RBY, at p.7 (Del. Super., Aug. 23, 2007) ("When Delaware Courts have mentioned the phrase 'gross abuse of discretion' it has been in the same breath as the term 'bad faith.'"). Suarez met all of the job qualifications, scored well during her two rounds of interviews, and her most recent performance evaluation was exceeds expectations. The decision to promote Suarez was not "so far beyond the bounds of reasonable judgment" as to suggest bad faith on the part of DSCYF. *Justice, supra*, at p.10.

with all three officers, he believed that Moye and Newman were better qualified than Haley.” 2006 WL 267208, at p.2. “Employers may rely upon subjective criteria that relate to an employee’s performance in their hiring decisions . . . Even if we were to disagree with [the Public Safety Director’s] impressions of the candidates’ experience and records, we will not second-guess a decision that is not based on discriminatory motives.” 2006 WL 267208, at p.3.

The Board does not have any reason to disbelieve the reason articulated by Elizabeth DiStefano as to why YRS promoted Suarez to the position of Family Services Program Support Supervisor: the depth and variety of her work experience.

The Board concludes as a matter of law that Brabson did not meet his burden to prove that the reason for promoting Suarez to the position of Family Services Program Support Supervisor was pretextual.

The Board will not infer intentional discrimination against Brabson in the promotional process from the comments made by Lynn Arnold and Dr. Bair at the training sessions in 2009 and 2010.⁵ “[C]omments by those individuals outside of the decisionmaking chain are stray remarks, which, standing alone, are inadequate to support an inference of discrimination.” *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521(3rd Cir. 1997). This is particularly true if the remarks “were made temporally remote from the date of decision.” *Kemp v. Wachovia Bank, N.A.*, 451 Fed.Appx. 151, 2011 WL 5517318, at p.4 (3rd Cir., Nov. 14, 2011).

Neither Arnold nor Dr. Bair was involved in the decision to promote Suarez to the position of Family Services Program Support Supervisor. Their stray remarks were made 2-3 years before the promotion decision which is too remote in time to infer discrimination, even if

⁵ The remarks made by Lynn Arnold and Dr. Bair were clearly inappropriate and the Board can well understand why Brabson was offended. The Board also believes that YRS could have taken more affirmative remedial measures such as e-mailing each of the individuals who attended the training sessions to disavow the remarks and reaffirm the agency’s commitment to a gender-neutral workplace.

those remarks could somehow be imputed to a member of the interview panel. ⁶

The Board concludes as a matter of law that Brabson did not meet his burden to prove that YRS intentionally discriminated against him on the basis of his gender when it promoted Suarez and not Brabson to the position of Family Services Program Support Supervisor.

DECISION AND ORDER


It is this **10th** day of June, 2013, by a unanimous vote of 3-0, the Decision and Order of the Board to deny Brabson's appeal.



MARTHA K. AUSTIN, MERB Chairwoman



VICTORIA D. CAIRNS, MERB Member



JOHN F. SCHMUTZ, MERB Member

⁶ Brabson tried to link Dr. Bair's remark to a member of the second interview panel, Carlyse Giddins, because Dr. Bair attended Giddins' retirement party. The Board finds that a long stretch. The Board does not believe that it can infer that YRS harbored any gender bias by letting YRS employees attend Dr. Bair's Women in Leadership workshops. The workshops are sponsored by the University of Delaware and are open to anyone who applies and pays or receives a scholarship.

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee's being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **June 10,** 2013

Distribution:

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Board Counsel